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IN THE
COURT OF APPEALS OF INDIANA

CHERYL A. WISE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 54A04-0610-CV-545
	)	
STEVEN K. WISE,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MONTGOMERY SUPERIOR COURT
The Honorable Thomas K. Milligan, Special Judge
Cause No. 54D01-0204-DR-135

January 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Respondent Cheryl A. Wise ("Mother") appeals a custody modification order awarding Appellee-Petitioner Steven K. Wise ("Father") custody of their child A.W. We affirm.

Issue

Mother presents two issues, which we have consolidated and restated as a single issue: whether the evidence is sufficient to support the custody modification order.

Facts and Procedural History

Mother and Father were divorced on August 22, 2002 and Mother was awarded the custody of the only child of the marriage, A.W. (born October 28, 1995).[1] On November 8, 2005, Father filed a Petition to Modify Custody and Support. On March 16, 2006, the trial court appointed James Painter to serve as a Court Appointed Special Advocate ("CASA") for A.W. On July 25, 2006, the trial court conducted a custody hearing. On August 22, 2006, the trial court ordered that Father have physical custody of A.W. Mother now appeals.

Discussion and Decision

Indiana Code Section 31-17-2-21 governs the modification of a child custody decree, and provides in pertinent part:

> (a) The court may not modify a child custody order unless:
>
> (1) the modification is in the best interests of the child; and
>
> (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8 and, if applicable, section 8.5 of this chapter.

[1] Mother and Father have other children with previous spouses.

Indiana Code Section 31-17-2-8 provides that the factors relevant to a custody order are as follows:

> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
> (5) The child's adjustment to the child's:
> (A) home;
> (B) school; and
> (C) community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Thus, a trial court may not modify custody until it determines that a substantial change has occurred and that a modification is in the child's best interests. Mundon v. Mundon, 703 N.E.2d 1130, 1135 (Ind. Ct. App. 1999). The party seeking the modification bears the burden of demonstrating that the existing custody order is unreasonable because, as a general proposition, stability and permanence are considered best for the child. Haley v. Haley, 771 N.E.2d 743, 745 (Ind. Ct. App. 2002).

We review a custody modification for abuse of discretion, with deference to the trial judge who had the opportunity to observe the demeanor of witnesses and scrutinize their testimony. Kirk v. Kirk, 770 N.E.2d 304, 306 (Ind. 2002). The trial court's necessary focus must be on what is best for the children under the totality of the circumstances. Id. at 308.

We set aside judgments only when they are clearly erroneous, and will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment. Id. at 307. Here, Mother argues that the sole statutory criteria implicated were A.W.'s age and wishes, and that the trial court placed undue emphasis on A.W.'s expressed desire to live with Father.[2]

The evidence suggests that A.W.'s relationship with Mother had deteriorated over the four years that Mother had physical custody of A.W. Indeed, A.W. wrote to the trial court on multiple occasions, seeking to have her viewpoint considered. She uniformly represented to the trial court, to her CASA, to her therapist, and to family members that she felt neglected by Mother. A.W. specifically complained that Mother prioritized her boyfriend over A.W. A.W. reported that Mother's boyfriend physically assaulted her, but Mother denied or minimized the incident. A.W. also reported that Mother did not give her a key to their apartment, and A.W. would sometimes be locked out. In therapy, A.W. appeared subdued and depressed and reported verbal abuse by Mother and Mother's eldest child.

There is also evidence that A.W.'s school performance was deteriorating, and that she struggled particularly with math. The CASA opined that A.W. needed "structure in her life" and "help with her homework." (Tr. 69.) He recommended that Father have physical custody of A.W., partially because of his own parenting abilities and partially because of his "support system … in terms of his father and his sister."

[2] Father did not file a brief in this appeal. Where the appellee fails to file a brief, it is within our discretion to reverse the trial court's decision if the appellant makes a prima facie showing of reversible error. Phegley v. Phegley, 629 N.E.2d 280, 282 (Ind. Ct. App. 1994), trans. denied. Prima facie error is error at first sight, on first appearance, or on the face of it. United Consulting Engineers v. Board of Com'rs of Hancock County,

As such, the evidence before the trial court implicated not only the statutory criteria of A.W.'s age and wishes, but also her adjustment to school and interaction with family members and Mother's boyfriend. There is abundant evidence that A.W. was greatly distressed by her circumstances in Mother's custody. Inasmuch as the evidence and reasonable inferences to be drawn therefrom support the trial court's decision to modify A.W.'s custody, we find no abuse of discretion.

Affirmed.

VAIDIK, J., and BARNES, J., concur.

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810 N.E.2d 351, 354 (Ind. Ct. App. 2004). Accordingly, this Court will not undertake the burden of developing arguments in favor of the appellee. Id.